Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-903

In The
Supreme Court of the United States
October Term, 1988

AMERICANA HOTELS, INC.,
FLAGSHIP INTERNATIONAL, INC.,
and MARK E. LIQUORI,
Petitioners,

v.

EUGENIE PARNAR,
Respondent.

BRIEF OF RESPONDENT, EUGENIE PARNAR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

L. RICHARD FRIED, JR.*
CRONIN, FRIED, SEKIYA,
KEKINA & FAIRBANKS
Suite 1900
Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 524-1433

JOHN A. CHANIN
JAMES Y. AGENA
KEITH Y. YAMADA
THE LAW OFFICES OF
JOHN A. CHANIN
Four South King Street
Honolulu, Hawaii 96813

* Counsel of Record
For Respondent
EUGENIE PARNAR

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether a punitive damages award based upon the Petitioners' unlawful and illegal discharge of the Respondent violated the Excessive Fines Clause of the Eighth Amendment of the United States Constitution?

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OPINIONS BELOW

The Opinion of the Supreme Court of Hawaii is unreported, but is reprinted in Petitioners' Appendix ("Pet. App."), commencing at page 1a. The Order Denying Motion for Reconsideration is reprinted in Pet. App., commencing at page 34a.

JURISDICTION

The judgment of the Supreme Court of Hawaii was entered on August 17, 1988, and the Petition For Certiorari, invoking 28 U.S.C. § 1257(3) as the basis for review, was timely filed on December 1, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article I, Section 12 of the Hawaii State Constitution provides in relevant part that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

COUNTER STATEMENT OF THE CASE

I. Nature of The Case

This case presents the issue of whether an award of punitive damages based upon an unlawful and illegal discharge of an employee violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. As Petitioners have acknowledged, the Court in *Bankers Life and Casualty Company v. Crenshaw*, — U.S. —, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) had the issue before it, but declined to decide the issue. Likewise, it is not prudent for the Court to address the Federal Constitutional issue in this case since the punitive damages award was not established below as excessive.

II. Statement of Facts

A comprehensive review of pertinent facts will expose Petitioners' claim that the punitive damages award violated the Excessive Fines Clause of the Eighth Amendment as being groundless under the circumstances.

From August 16, 1972 through October 24, 1975, Eugenie Parnar (hereinafter "Respondent") was employed at the Ala Moana Hotel (hereinafter "The Hotel") as a secretary to the controller of the hotel. Petitioner Americana Hotels, Inc., (hereinafter "Americana"), was the managing partner of the Hotel and Petitioner Flagship International, Inc., (hereinafter "Flagship"), a subsidiary of American Airlines, was the operator of the Hotel.

From March of 1975 through October 24, 1975, Petitioner Mark Liquori, (hereinafter "Liquori"), was the controller of the Hotel and the supervisor of Respondent. Respondent's duties included obtaining rate and occupancy information from other hotels for the use of the employees and officers of the Petitioners.

The facts of this case are summarized in the Court's decision in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 371-3 and 381, 652 P.2d 625 n.18 (1982).

The hotel industry in Hawaii in the early 1970's conspired to exchange inside rate and occupancy information. When Respondent began work at the Hotel there was an existing practice between competitor hotels of exchanging inside information each month. The exchange continued until Petitioners were told by their New York corporate office to stop the practice after the United States Department of Justice began its antitrust investigation.

At the direction of each of her supervisors, from 1972-1975, part of Respondent's duties as secretary to the Controller of the Hotel was to continually exchange inside occupancy and rate information each month with competitor hotels in Waikiki. This included the "actual rates and published rates and the internal figures that are computed within the hotel." This information was dissem-

inated not only to the Hotel General Manager, and Director of Rooms, but also telexed to the New York corporate office. The information was given to the New York Vice President of Finance and other executives who would use it during Americana's annual forecast meetings. The information was used "to manipulate their figures so they could get their forecast down to make a profit." Respondent did not realize that anything she had done with respect to exchanging rate and occupancy information was wrong or illegal until Liquori stopped her from exchanging information and told her that the practice was what the United States Department of Justice was "investigating".

Prior to Respondent's termination, Americana became the subject of a criminal antitrust investigation by the United States Department of Justice. Liquori was aware of this before he came to Hawaii in 1975 and took it upon himself to become familiar with the antitrust laws.

Liquori testified that he told Bogdahn, the general manager of the Hotel and group vice-president of Americana, that the exchange of inside information "might appear to be" illegal. Bogdahn testified that *"I really didn't . . . think it [the exchange of information] was illegal until our corporate people said, 'If you're doing anything in that area, stop.'"* (*emphasis added*).

As Tookie Evans, the Americana Director of Sales in 1975 testified:

> "Mr. Bogdahn had advised many of the department heads, including myself, that there was apparently an antitrust investigation going on, looking into the business of possible rate fixing, I guess, amongst the hotels. And he had cautioned us at that point to stop discussing rates or occupancy with any of the hotels."

In September 1975, Liquori told Respondent that she was to meet with an attorney "regarding the exchange of rates and occupancy percentages." Liquori failed to inform Respondent who the attorney represented. Because Respondent had never previously met with an attorney and thought she might have been involved in criminal activity, she was very frightened.

Before the meeting, Respondent did not know that Liquori intended to sit in the meeting with her. On the day of the meeting, Respondent told Liquori she wanted to meet with the attorney alone. Respondent was afraid Liquori would challenge what she said to the attorney. Respondent was also concerned that Liquori twice stated that Bogdahn said he "didn't know anything about the exchange of rates", which indicated to her that Liquori was "covering for Bogdahn" in order to "make [her] the scapegoat". Respondent had given Bogdahn the rates all through her tenure at the Hotel.

When Respondent met with the attorney, she became concerned about her job when he told her, "You won't lose your job over this, at least I don't think." When the attorney told Respondent that he would type her statement to sign, "[she] became very afraid," thinking he might have been a "federal attorney." She thought she might be imprisoned for violating the antitrust laws. She "didn't know if someone was going to be waiting outside to take [her] away or whatever." She feared that "somebody would slap handcuffs on [her] when [she] walked out of there" because "you're not talking at an ordinary meeting . . . , you're talking federal, antitrust violations and you're talking prosecution". She feared her family would be disgraced.

Immediately after the meeting, Liquori called Respondent to his office, was very angry, and told Respondent he wanted to be in the room *to prevent her from "[saying] something to hurt the hotel."* (*emphasis added*). On the following Monday when Respondent tried to communicate with Liquori to find out what the problem was, he told her "I know we can't work with you anymore." When she asked "why?", he responded, "Did you ever hear about Rosemary Woods?".

When Respondent asked Liquori how heavily she was involved in the antitrust investigation, he told her she was "a key witness", that people were going to jail and that the Hotel could be heavily fined:

> [H]e told me that I was a key witness in the antitrust investigation . . . that my testimony could cause the hotel to be heavily fined and Mr. Bogdahn could lose his job.
>
> He said the food and beverage was caught for price fixing. *People are put in jail for things like that. We had tried to maybe settle on your behalf but they wouldn't let us.*

(*emphasis added*).

Liquori also told Respondent that "the Ford Administration was cracking down on price fixing and that people were put in jail for such things as this." According to antitrust expert, attorney Jerrold Guben, President Ford gave the antitrust division of the Department of Justice greater power and independence to prosecute antitrust violations.

During her employment, Liquori also suggested that Respondent obtain inside information from the Outrigger Hotels, a competitor, in a way that strongly indicated that the Hotel wanted her to get the information surreptitious-

ly. Liquori knew that Respondent worked there part time and told her that his boss, Mr. Bogdahn, wanted her to get the Outrigger figures. Liquori obviously intended to pressure his subordinate to get the information. Respondent's refusal to breach a confidence in furtherance of Petitioners' illegal antitrust activities was also part of the reason Liquori fired her. Liquori first tried to give Respondent money and offered to find her a job on the mainland. Then he told her "You won't find work here." When the Respondent asked if the termination had anything to do with the antitrust investigation, Liquori responded, "Partly."

Tookie Evans, Americana Director of Sales, testified that he overheard a conversation between Liquori and Bogdahn in which Respondent's continued exchange of information was described as "a liability" to the Hotel because of the criminal investigation. Mr. Evans knew that a criminal antitrust investigation was directed against the Hotel and that the consequences of that investigation was "bad news".

Tookie Evans recalled a conversation between Liquori and Bogdahn in which Respondent was described as a liability to the Hotel:

> Q. What was your impression as a result of that meeting?
>
> A. My impression was that *we had probably created a liability for ourselves,* in effect, that someone [Respondent] was continuing to do something which would possibly in the long run provide information for the [antitrust] investigation that was going on."
>
> Q. Were you aware back then what the consequences [of a criminal antitrust investigation] would be, generally?

A. Generally, you know, it would be bad news. Antitrust investigation is the federals after all.

Q. Criminal investigation.

A. Right.

(*emphasis edded*).

Melissa Fontes, the Director of Personnel of the Hotel, testified that the Hotel followed union policies in each and every instance of discipline and termination of employees, including non-union employees. The Hotel followed progressive discipline procedures, such as warnings and advance notices before terminating employees. It also transferred them to other positions as an alternative to termination. These options in the testimony of Liquori, did "not cross my mind." Plaintiff was never given an alternative to termination.

According to Melissa Fontes, the Hotel, in terminating Respondent, violated its own established union-like policies and practices of fair treatment of non-contract, at will employees:

> "I didn't feel that I could approach Mark [Liquori]. I felt it was a finality, and basically because I didn't know the details of the antitrust story . . . I think, I thought, well this is bigger than just the personnel end of it . . . And I do believe that I sensed you know, the whole project was bigger than all of us. I mean, the antitrust thing was so crucial at the time and so delicate a subject that I do believe at the time too I let that affect me in terms of that this is bigger and would I be interfering with the system?"

The jury reasonably concluded, as did the Hawaii Supreme Court in *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 381 n.18, 752 P.2d 625 (1982), that Liquori gave inconsistent reasons for her discharge. Testimony at trial

and her records showed only positive recommendations, evaluations and merit increases, and revealed no problems existed until the antitrust matter focused on her involvement in September of 1975, which resulted in her firing the following month. Petitioners believed that the exchange of information was illegal, pled *nolo contendere* to antitrust violations, and subjectively feared Respondent's testimony.

On October 24, 1977, Respondent filed a complaint which alleged, *inter alia*, that Liquori and others conspired to discharge Respondent in order to induce her to leave the jurisdiction and prevent her testimony before the grand jury or any subsequent criminal trial and that such discharge was without cause and malicious. Respondent sought special, general, and punitive damages from Petitioners, jointly and severally.

After the trial court granted summary judgment on her complaint, Respondent appealed to the Hawaii Supreme Court. The Hawaii Supreme Court reversed and remanded the case and held that "an employer may be held liable in tort where his dicharge of an employee violates a clear mandate of public policy". *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 380, 652 P.2d 625 (1982) Pet. App. "A", commencing at page 19a.

On remand and at the conclusion of the trial on Respondent's cause of action, the jury found that Petitioners fired Respondent to prevent her from testifying in an attempt to thwart an antitrust investigation and awarded her $300,000 in actual damages, $275,000 for emotional distress and $1,500,000 in punitive damages. The lower court instructed the jury that:

> A clear mandate of public policy is violated when an employee's discharge is motivated by the employer's intent to prevent her from being a witness in an antitrust investigation.
>
> If you find that defendants fired plaintiff to prevent her from being a witness in an antitrust investigation, then defendants violated the clear mandate of public policy.

In response, the jury found that Plaintiff's discharge violated a clear mandate of public policy. Special Verdict Answer #1. Petitioners' Motion for New Trial and Motion Notwithstanding The Verdict were denied on August 13, 1987.

On August 18, 1987, Petitioners filed their Notice of Appeal in the Hawaii Supreme Court. In its Opening Brief, Petitioners cited both the Eighth Amendment of the United States Constitution as well as Act 1, Sec. 12 of the Constitution of the State of Hawaii, but failed to adequately inform the state appellate court of the basis for their assertion that the jury verdict violated the aforesaid Federal Constitutional principles.

On August 17, 1988, the Supreme Court of Hawaii affirmed the trial court decision and did not pass upon the Federal Constitutional issues raised before this Honorable Court in this instant petition. Pet. App. "A", commencing at page 1a. Justice Nakamura dissented and addressed the excessive fines issue, *sua sponte*, but focused his dissent on the *ex post facto* nature of the award as well as other evidentiary issues.

On August 26, 1988, Petitioners filed their Motion For Reconsideration of the Memorandum Opinion entered by the Hawaii Supreme Court on August 17, 1988. The

Hawaii Supreme Court entered its Order Denying Motion For Reconsideration on September 2, 1988.

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REASONS FOR DENYING THE WRIT

I. Petitioners Failed To Preserve Their Constitutional Challenge In Their Appeal To The Hawaii Supreme Court

This Court has consistently held that it will not decide Federal Constitutional questions not presented nor decided in the highest court of the state. *Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).[1]

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[1]In *Banker's Life, supra,* the Petitioner, in its motion for rehearing to the Mississippi Supreme Court, raised for the first time its claim that the punitive damage award violated the Excessive Fines, Due Process and Contract clauses of the Federal Constitution. In *Webb v. Webb, supra* 451 U.S., at 499, this Court stated that principles of comity which support the "not pressed or passed upon below" rule requires that the state courts be afforded the opportunity to perform their duty, which includes . . . "construing and applying the applicable federal requirements". The Court also cited practical reasons supporting the "not pressed or passed on rule" including, (a) "affording the parties the opportunity to develop the record necessary for adjudicating the issue"; (b) insuring that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner; and (c) allowing the issues to be adjudicated in the state courts where necessary to dispose of the case which may eliminate the necessity of a subsequent adjudication by this Court. In *Taylor v. Illinois,* — U.S. —, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), the Petitioner failed to specifically articulate his claim based upon the Compulsory Process clause until he filed his petition for rehearing. However, the Petitioner cited and relied upon two opinions of this Court based upon Compulsory Clause claims. The Court concluded that the Petitioner's citation to authority referring to the Constitutional violation and the state appellate court's understanding of the Federal Constitutional question sufficiently presented the issue to the state court to support this Court's jurisdiction.

"At a minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were appraised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* 451 U.S., at 501. With respect to the Constitutional issue raised in this proceeding, the Court in its October 1987 term held that "[a] vague appeal to constitutional principles does not preserve appellant's [federal constitutional] claim." *Bankers Life and Casualty Company v. Crenshaw, supra* 108 S.Ct., at 1650. This Court reaffirmed its policy to decline review of a petitioner's claims where the "petitioner generally invok[es] the Constitution in state court and await[s] review in this Court to specify the constitutional provision it is relying upon." *Id.* 108 S.Ct., at 1650. Here, Petitioners failed to argue the basis upon which they assert the punitive damages award was excessive. Where the decision of the state court does not discuss the Federal Constitutional issue, the omission will be assumed to be due to the want of proper presentation in the state courts, unless the Petitioner can affirmatively show to the contrary. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 183, 103 S.Ct. 2296, 2301, 76 L.Ed.2d 498 (1983).

Petitioners herein contend that they properly raised the issue of whether the award of punitive damages violated the Eighth Amendment before the Hawaii Supreme Court. However, Petitioners failed to adequately brief the Federal Constitutional issue in their appeal to the Hawaii Supreme Court and relied on their argument that the award of punitive damages was excessive based generally upon the facts presented at trial, the assets of the

defendant and the conduct of the defendant.[2] In addition, in their Motion For Reconsideration, the Petitioners' failed to again specifically raise the Eighth Amendment Issue.[3] The Petitioners' vague and conclusory contentions that the punitive damages award was an excessive fine, without demonstrating the reasons therefore, (*i.e.* inability to pay), failed to apprise the Hawaii Supreme Court that the $1.5 million punitive damages award was disproportionate on its face. More importantly, the Hawaii

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[2]In their opening brief, Petitioners' argument on the Constitutional issue raised herein was limited to the conclusory statement that, "[t]he imposition of excessive and unreasonable punitive damages violates Defendants' Constitutional right against excessive fines. Constitution of the State of Hawaii, Section 12; United States Constitution, Eighth Amendment." Petitioners failed to assert their Federal Constitutional argument in their statement of questions presented to the Hawaii Supreme Court. Pursuant to Rule 3(b)(3) of the Rules of the Supreme Court of the State of Hawaii, issues not contained within the statement of questions presented will be disregarded. *Kang v. Harrington,* 59 Haw. 652, 656, 587 P.2d 285, 288 (1978) n. 1. Since the Hawaii Supreme Court's opinion did not address the Constitutional issue, the judgment might have rested upon a non-federal ground. *Stembridge v. Georgia,* 343 U.S. 541, 547, 72 S.Ct. 834, 96 L.Ed. 1130 (1952); *Webb v. Webb,* 451 U.S. 493, 498, 101 S.Ct. 1889, 1892, 68 L.Ed.2d 392, 398 (1981) n. 4.

[3]Petitioners argued in the reconsideration memorandum that, "[h]owever, the most serious issue with respect to punitive damages overlooked by the Memorandum Opinion is the violation of fundamental notions of due process by the imposition of such an excessive fine. At the time of the termination the common law in the State of Hawaii imposed no liability for the Defendants' actions. *Not until seven years later was even a cause of action created.* To then impose a $1,500,000.00 fine on Defendants for actions they had no reason to suspect were going to be deemed actionable is a grossly unfair application of *ex post facto* punishment. Such a fine violates every notion of due process and fundamental fairness embodied in both the Hawaii and the United States Constitutions."

Constitution also contains an Excessive Fines Clause. Hawaii Const. Art. 1, § 12.

Furthermore, this Court recognized the policy in favor of allowing a state legislature or state court to establish a less intrusive resolution of the controversy. *Bankers Life, supra* 108 S.Ct., at 1651. The Hawaii Supreme Court was in a position to adequately deal with the question of excessive fines. Petitioners simply failed to adequately present the Excessive Fines issue based upon the Eighth Amendment to the Federal Constitution to the Hawaii Supreme Court and have failed to preserve the Federal Constitutional issue for consideration by this Honorable Court. Petitioners have thus failed to sustain their burden of affirmatively showing that they properly presented the Eighth Amendment issue to the Hawaii Supreme Court.

II. The Punitive Damages Award Below Does Not Violate The Excessive Fines Clause Of The Eighth Amendment

Petitioners contend that the punitive damages award herein is excessive under the Eighth Amendment of the Federal Constitution based upon four factors which are determinative of the issue: the objective of punitive damages in this case, the importance of the public interest protected, the circumstances of the act and the ability of Petitioners to pay the award.

Hawaii case law has consistently recognized the propriety of an award of punitive damages where the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. *Bright v. Quinn*, 20 Haw. 504, 512 (1911); *citing, Lake Shore & Michigan Southern Rail-*

way Co. v. Prentice, 147 U.S. 101, 107, 13 S.Ct. 261, 37 L.Ed. 97 (1892). More importantly, several Hawaii cases awarding punitive damages focus upon the defendant's state of mind in determining whether an award of punitive damages is appropriate. *Quedding v. Arisumi Brothers, Inc.,* 66 Haw. 335, 661 P.2d 706 (1983) (wanton or reckless breach of construction contract); *Hall v. American Airlines,* 1 Haw.App. 312, 617 P.2d 1240 (1980) (fraudulent scheme).

Petitioners assert that since the cause of action for wrongful termination was not established as of the date of their wrongful conduct, they should not be liable for punitive damages based upon the Ex Post Facto and Due Process clauses of the Fifth Amendment to the Constitution. An *ex post facto* law has been defined by this Court as one that makes an action done before the passing of the law, which was *innocent* when done criminal; and punishes such action, or that *aggravates* a *crime,* or makes it *greater* than it was when committed. *Bouie v. City of Columbia,* 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964). The Petitioners' conduct certainly amounted to conduct contrary to public policy as expressed by existing statute and court rules.

It is a violation to engage in conduct "with the intent to . . . cause or induce any person to . . . withhold testimony . . . or . . . hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a federal offense . . ." 18 U.S.C. § 1512. *U.S. v. Murray,* 751 F.2d 1528, 1534 (9th Cir. 1985), *cert. denied* 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985) (Defendant convicted of instructing a witness not to testify and to give false testimony). Hawaii Revised Statutes §§ 710-1071 and 710-

1072 expressly makes it an offense where a person intimidates and/or tampers with a witness.[4]

Moreover, firing an employee to thwart an investigation is so fundamentally wrong and a per se violation of the law that it need not await action by a state appellate court to establish it as a wrong. An attempt to conceal a witness to frustrate or defeat an investigation is tantamount to an obstruction of justice and strikes at the very heart of our judicial system. The aforesaid statutes were effective at the time of Petitioners conduct. Petitioners' conduct violated a firmly established public policy which is the backbone of our judicial system. The punitive damages award therefore was proper under the circumstances since Petitioners knew or should have known that their conduct violated an important and established public policy and thus did not amount to an *ex post facto* punishment. The punitive damages award therefore satisfies the objective of upholding the important public policies which are at the root of various obstruction of justice statutes and antitrust prohibitions. The punitive damages award resulted from Petitioners' efforts to conceal and cover-up

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[4]Hawaii Revised Statutes § 710-1071 provides, in relevant part, that: [a] person commits the offense of intimidating a witness if he uses force upon or a threat directed to a witness or a person he believes is about to be called as a witness in any official proceeding, with intent to: (a) Influence the testimony of that person; (b) Induce that person to avoid legal process summoning him to testify; or (c) Induce that person to absent himself from an official proceeding to which he has been legally summoned. Hawaii Revised Statutes § 710-1072 provides, in relevant part, that: [a] person commits the offense of tampering with a witness if he intentionally engages in conduct to induce a witness . . . to: (a) Testify falsely or withhold any testimony which he is not privileged to withhold; or (b) Absent himself from any official proceeding to which he has been legally summoned.

their conduct, to thwart an antitrust investigation, and damage and denigrate the judicial process. The jury spoke in a loud voice and sent a message that such conduct will not be tolerated.

Petitioners also argue that the remedy of punitive damages in this case is duplicative of other statutory prohibitions which effectively deter Petitioners and other like employers similarly situated from wrongfully discharging their employees based upon the employee's possible participation in a governmental investigation. Although the Petitioners recognize that Section 4 of the Clayton Act provides a remedy to discharged employees, there was no award in favor of Respondent based upon said statutory violations. In ruling that *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), *vacated* 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983), *on remand* 740 F.2d 739 (9th Cir. 1984), *cert. dismissed* 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985), would not be followed in Hawaii, the trial court prevented Parnar from seeking treble damages under the Clayton Act. Therefore, an award of punitive damages was the only remedy available to the jury to address the Petitioners' egregious and malicious conduct. Thus, if Petitioners are not held liable for punitive damages as provided by the judgment, their malicious, oppressive and illegal conduct would go unpunished.

Petitioners finally argue for the first time that the punitive damages award was overly burdensome, given their stipulated net worth. The relationship of net worth to the amount of punitive damages is only one circumstance to consider in determining excessive damages, the circumstances of Petitioners' conduct must also be con-

sidered. An award of punitive damages is not considered excessive as long as it punishes the wrongdoer without causing financial ruin. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1025 (9th Cir. 1985), *cert. denied* 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986).[5] Petitioners failed to introduce any evidence at trial or at any hearing regarding their inability to pay an award of punitive damages and also failed to argue the issue of their inability to pay on appeal. The record thus fails to demonstrate that the award is disproportionate to the economic resources of the Petitioners. Moreover, Petitioners' ability to post a $2.3 million supercedeous bond suggests that Petitioners are certainly not impecunious.

The Petitioners' citation to other punitive damage awards in this jurisdiction disregards the established rule that each case turns on its own facts including the Defendant's state of mind and degree of malice, oppression and gross negligence which forms the basis for the award. *Kang v. Harrington*, 59 Haw. 652, 587 P.2d 285 (1978). Here, there was ample evidence before the jury of Petitioners' malicious and oppressive conduct to justify the amount of punitive damages awarded.

The award of punitive damages entered in the trial court and affirmed by the Hawaii Supreme Court is proper under the circumstances and is not overburdensome or disproportionate and therefore does not violate the Excessive Fines Clause of the Eighth Amendment.

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[5]In *People v. Ingham*, 115 Misc.2d 64, 453 N.Y.S.2d 325 (1982), a case cited by Petitioners herein, the defendant, who had pled guilty to a charge of driving while under the influence of alcohol, introduced testimony at an ability to pay hearing that she had no discretionary income and lived at subpoverty levels.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

L. Richard Fried, Jr.
Cronin, Fried, Sekiya,
Kekina & Fairbanks
Suite 1900
Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 524-1433

John A. Chanin
James Y. Agena
Keith Y. Yamada
The Law Offices of
John A. Chanin
Four South King Street
Honolulu, Hawaii 96813